Supreme Court, U.S.
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No. 06-220

IN THE

Supreme Court of the United States

PHILIP H. SANDERSON,

Petitioner,

v.

HCA-THE HEALTHCARE COMPANY;
COLUMBIA HEALTH CARE CORPORATION;
HOSPITAL CORPORATION OF AMERICA;
and HEALTHTRUST INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the heightened pleadings requirement of Rule 9(b) requires a qui tam plaintiff to specifically describe more than the fraudulent accounting scheme underlying a series of continuous and ongoing false hospital cost reports which inflate the defendants' opening claims for reimbursement from the government?

2. Whether false claims submitted within the period of limitations, but based upon a fraudulent accounting scheme developed outside the limitations, but still in use, are time barred?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents HCA – The Healthcare Company, Columbia Health Care Corporation, and Hospital Corporation of America are predecessor companies to the company now known as HCA Inc., which does not have a parent corporation. There is no publicly held corporation that owns 10% or more of the stock of HCA Inc. Respondent Healthtrust, Inc., a Delaware corporation, is a wholly owned subsidiary of HCA Inc.

STATEMENT OF THE CASE

Petitioner, a *qui tam* relator, filed his original complaint on June 28, 2001, on behalf of the United States as the real party in interest, alleging that respondents had submitted false claims to government healthcare programs in violation of the False Claims Act, 31 U.S.C. § 3729, *et seq.* On July 1, 2003, following the decision of the Department of Justice not to intervene in the action, respondents moved to dismiss the complaint on the following grounds: (i) it was time-barred by the applicable six-year statute of limitations, 31 U.S.C. § 3729(b), (ii) it failed to plead fraud with particularity as required by Fed. Rule Civ. Proc. 9(b), and (iii) it failed to state a claim upon which relief can be granted under Fed. Rule Civ. Proc. 12 (b)(6). On July 27, 2003, the district court entered an order allowing petitioner to amend the initial complaint. The amended complaint was filed on February 26, 2004. Respondents renewed the motion to dismiss. On September 28, 2004, the district court granted the motion and dismissed the amended complaint with prejudice. Petitioner appealed to the Court of Appeals. On May 12, 2006, the Court of Appeals affirmed the judgment of the district court. (Pet. App. 1a-21a)

REASONS FOR DENYING THE PETITION

I. The Petition Fails to Satisfy Any of this Court's Criteria for a Grant of *Certiorari*

The petition seeks review by this Court of the question whether Rule 9(b)'s requirement that averments of fraud be pleaded with particularity should apply to complaints alleging violations of the False Claims Act but does not contend that the decision of the circuit court on this issue is in conflict with prior decisions of this Court or with any other circuit. In the decision below, the circuit court held that the district court's dismissal of petitioner's amended complaint "was

fully in conformity with existing Sixth Circuit precedent," citing two recent decisions where it had applied Rule 9(b) to complaints alleging violations of the False Claims Act. *See, e.g., United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634 (6th Cir. 2003); *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 563 (6th Cir. 2003). (Pet. App. 10a). The decision below also cites to *United States ex rel. Karvelas v. Melrose-Wakefield Hospital*, 360 F.3d 220 (1st Cir. 2004), where the First Circuit observed that, "every circuit court that has addressed this issue has concluded that the heightened pleading requirements of Rule 9(b) apply to claims brought under the [False Claims Act]." *Id.* at 228 (collecting cases from the Third, Fourth, Fifth, Sixth, Ninth, Eleventh, and District of Columbia circuits).

Petitioner also does not contend that the decision below is inconsistent with this Court's precedents. Instead, the petition effectively invites this Court to overrule the unbroken line of precedent set forth above by reference solely to *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336 (2005). Yet in *Dura Pharmaceuticals*, this Court reversed as unduly permissive a Ninth Circuit decision on the pleading standard with respect to the element of loss causation in a securities fraud complaint – an issue irrelevant to the False Claims Act. *Id.*

In sum, the petition presents no "compelling reasons" in support of the grant of *certiorari*. *See* S. Ct. R. 10.

II. The Petition Mischaracterizes the Decisions Below

The petition asserts that the court below affirmed the dismissal of the amended complaint on the sole ground that it failed to comply with the pleading requirement of Rule 9(b), and "indicated *in dicta* that the trial court was correct in its determination that the claims were time barred and did not state a claim under Rule 12(b)(6)." (Pet. 2). This is a misleading characterization of the record below.

The circuit court had no doubt that the amended complaint was legally insufficient on multiple grounds, stating that: "The district court granted the motion ***on all three grounds***. . . ." (Pet. App. 4a-5a) (emphasis added). Far from being *dicta*, the circuit court found that the district court had correctly decided each of these issues on the merits, stating:

> We conclude that the district court was likewise correct in determining that the complaint was not timely filed and did not state a cause of action on which relief could be granted, both grounds for dismissal under Rule 12(b)(6). Because the basis for the Rule 9(b) determination is so clearly indicated, however, we find it unnecessary to discuss the remaining issues raised under Rule 12(b)(6).

(Pet. App. 11a).

The petition's apparent purpose in mischaracterizing the record relates to the second of the questions presented – whether the courts below applied the statute of limitations erroneously. However, the circuit court held that it was the failure of the amended complaint to allege ***any facts or law or regulation*** in support of its theory – and not any allegedly erroneous application of the statute of limitations – which required dismissal. (Pet. App. 9a). Petitioner tried below to cure the statute of limitations defect by alleging "on information and belief" that conduct occurring in 1981-86 continued into the limitations period, but this effort failed because, according to the circuit court, petitioner alleged no "factual basis for such belief." *Id.* Allowing such a pleading to go forward would amount to "a license to base claims of fraud on speculation and conclusory allegations." *Id.*, citing *United States ex rel. Thompson v. Columbia/HCA Healthcare*

Corp., 125 F.3d 899, 903 (5th Cir. 1997) (quoting *Tuchman v. DSC Commc'n Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994)).[1]

Turning to the merits, the courts below correctly determined that the amended complaint was time barred. The district court held that the amended pleading failed to "set forth specific allegations of fraudulent conduct in violation of the False Claims Act within six years of the filing date of the action." (Pet. App. 19a). Even though the court had allowed petitioner to amend the initial complaint, and he was therefore "on notice that the statute of limitations was at issue," petitioner failed to cure that deficiency. *Id.* Indeed, as the circuit court stated, "the amended complaint was virtually unchanged from the original. . . ." (Pet. App. 3a).

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1. The petition relies upon *United States v. Bornstein*, 423 U.S. 303 (1976), in support of the grant of *certiorari* on this point. *Bornstein*, however, neither involved the issue of the legal sufficiency of a False Claims Act pleading nor the application of the applicable statute of limitations, but rather how the Act should be interpreted for purposes of determining the proper measure and calculation of damages following its violation. *Id.* at 306-07.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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